

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

KENNETH DREW,

Defendant.

2:05-CR-0004 RLH-(RJJ)

REPORT & RECOMMENDATION  
OF UNITED STATES  
MAGISTRATE JUDGE

(Defendant's Motions to Suppress  
Evidence for Fourth Amendment  
Violation (#35))

This matter came before the Court on a hearing on Defendant Kenneth Drew's Motion to Suppress Evidence for Fourth Amendment Violation (#35). The Court has considered the Motion (#35), the Government's Opposition (#36), the Defendant's Response (#37) and the testimony and evidence presented at the evidentiary hearing. The Court has also considered Defendant's Supplemental Briefing (#39) and Addendum to Supplemental Briefing (#41), as well as the Government's Supplemental Briefing (#43).

**BACKGROUND**

On January 11, 2004, Deputy W. Garza of the Lincoln County Sheriff's Department received a tip from a confidential informant that the defendant, Kenneth Drew, was in possession of stolen property taken during a recent burglary. The confidential informant told Deputy Garza that Drew had invited the informant into his home, where the defendant proceeded to show him a locked room containing, amongst other things, some cameras, a clarinet and a saxophone. Prior to contacting the police, the confidential informant stated that he had contacted the victim of a recent

1 burglary, Carma Eizman, and the victim's daughter, and obtained a verbal description of the clarinet  
2 and saxophone stolen from their home. These descriptions matched the clarinet and saxophone  
3 observed in Drew's locked room. In addition to this, the victim described in detail a knife that was  
4 stolen from the residence. The knife, a straight blade Remington hunting knife with a light tan  
5 sheath with a velcro closure, matched a knife given to the informant by Drew, and subsequently  
6 turned over to the police. On January 13, 2004, Deputy Garza contacted the burglary victim with  
7 whom the confidential informant had spoken, and received a verbal description of the stolen knife,  
8 which matched the knife provided by the informant.

9 In addition to the tip provided by the confidential informant, investigators learned of another  
10 residential burglary implicating defendant Drew. John Van Houton, the victim of a November 2003,  
11 burglary informed the police, via a note provided on December 29, 2003, that an individual named  
12 Joe Delmue had informed him that the defendant had tried to sell Delmue a camera matching the  
13 description of the one stolen from the victim's residence. Upon speaking with this victim, police  
14 were informed that the camera had been returned to the victim by a Darrin Zaro, a known associate  
15 of the defendant. Although initially Mr. Zaro had attempted to extort money from the victim as a  
16 reward in return for the camera, he ultimately returned the camera without receiving any money.

17 On January 14, 2004, after receiving the information from the confidential informant and  
18 speaking with burglary victims Eizman and Van Houton, Officer Garza obtained a search warrant  
19 for the defendant's residence and executed it the same day. The search of the residence revealed a  
20 locked room from which police seized a clarinet, Winchester rifle and a .12 gauge shotgun, among  
21 other items. The firearms matched descriptions of items stolen during a residential burglary  
22 investigated by Sgt. Kerry Lee on January 14, 2004. The defendant was apprehended outside his  
23 residence as he attempted to flee from police. During his attempt to run, the police observed the  
24 defendant throw what appeared to be a small black case. The case was found shortly after Drew was  
25 taken into custody and contained a syringe, a hemostat and what appeared to be a vile of  
26 methamphetamine.

27 Upon his arrest, the defendant was read his Miranda rights and placed in a police car, from  
28 which he requested to speak to the police. The defendant was told that he would have a chance to

1 talk with police later, as the officers were occupied with searching Drew's residence. The defendant  
2 did not speak with officers until his interrogation the next day, January 15, 2004. At the beginning  
3 of the interrogation Drew was reminded that he had previously been read his rights and was asked  
4 if he wanted them re-read to him and if he understood his rights. Drew waived a second reading of  
5 his Miranda rights and acknowledged that he understood his rights. During the video-taped  
6 interrogation the defendant confessed to the burglary of several homes in Caliente. On January 1,  
7 2005, Kenneth Drew was indicted by a federal grand jury and charged with violating 18 U.S.C.  
8 Section 922(g)(1) and 924(a)(2), Felon in Possession of a Firearm.

9 The defendant moves the Court to suppress all evidence seized as a result of the search  
10 warrant as well as any statements made during his custodial interrogations. Drew claims that the  
11 search warrant lacked the necessary probable cause and was issued based on misleading information  
12 contained in the affidavit. Furthermore, the defendant argues that he did not voluntarily waive his  
13 Miranda rights prior to his custodial interrogation, making the statements obtained during the  
14 interrogation inadmissible.

## 15 DISCUSSION

### 16 I. Franks Hearing

17 "A defendant is entitled to an evidentiary hearing on the validity of the affidavit underlying  
18 a search warrant if the defendant can make a substantial preliminary showing that (1) the affidavit  
19 contains intentionally or recklessly false statements or misleading omissions, and (2) the affidavit  
20 cannot support a finding of probable cause without the allegedly false information." United States  
21 v. Reeve, 210 F.3d 1041, 1044 (9<sup>th</sup> Cir. 2000). In requesting a Franks hearing, the defendant must  
22 present to the Court "allegations of deliberate falsehood or of reckless disregard for the truth, and  
23 those allegations must be accompanied by an offer of proof." Franks v. Delaware, 438 U.S. 154, 171  
24 1978). Where a judge has issued a warrant on misleading information contained in the affidavit,  
25 which was known to be false or should have been known to be false but for reckless disregard,  
26 suppression is appropriate. United States v. Leon, 468 F.897, 923 (1984). When reviewing an  
27 issuing court's determination of probable cause, it need only be found that a "substantial basis"  
28 existed for a finding of probable cause. United States v. Vesikuru, 314 F.3d 1116, 1122 (9<sup>th</sup> Cir.

1 2002).

2 The defendant argues that a Franks hearing is necessary because the affidavit for search  
3 warrant: 1) failed to inform the issuing judge about Darrin Zaro's attempt to extort money from  
4 burglary victim Van Houton, and 2) included information regarding footprints discovered at burglary  
5 scenes which were never tied to the defendant. According to the Drew, paragraphs 11-14 of the  
6 affidavit contain information regarding the burglary of the camera, the note from Van Houton to  
7 police, and the return of the camera by Zaro, but omits the fact that Zaro attempted to extort reward  
8 money from the victim in exchange for the return of the camera. Drew asserts that the reckless, if  
9 not intentional, failure of the affidavit to include material information regarding Zaro's credibility  
10 undermines a finding of probable cause. In addition to this omission, Drew argues that the inclusion  
11 of information in paragraphs 15 and 16 of the affidavit regarding the discovery of footprints at the  
12 scene of the two of the burglaries is misleading as no connection is made between the defendant and  
13 the footprints.

14 Despite the arguments presented by the defendant, and the Government's concession that the  
15 footprint information in paragraphs 15 and 16 do not contribute to a probable cause determination,  
16 the Court finds the defendant fails to meet the threshold necessary for a Franks hearing. Drew does  
17 not adequately set forth "allegations of deliberate falsehood or of reckless disregard for the truth"  
18 sufficient to find that the affidavit cannot support a finding of probable cause. Franks v. Delaware,  
19 438 U.S. 154, 171 (1978). Sufficient information exists in paragraphs 1-10, 17-18 of the affidavit  
20 regarding the tip provided by the confidential informant, and the verification thereof, to establish  
21 probable cause necessary to issue the search warrant. The defendant's motion to suppress evidence  
22 obtained as a result of the search warrant is denied.

## 23 **II. Waiver of Miranda**

24 "A heavy burden rests on the government to demonstrate that the defendant knowingly and  
25 intelligently waived his privilege against self-incrimination and his right to retained or appoint  
26 counsel." Miranda v. Arizona, 384 U.S. 436, 475 (1966); see also Colorado v. Connelly, 479 U.S.  
27 157, 165 (1986). To prove valid waiver, the government must show that (1) the waiver was  
28 voluntarily made and not the product of coercion, and (2) that at the time of the waiver the defendant

1 understood both the nature of the right being waived and the consequence of the waiver. Moran v.  
2 Burbine, 475 U.S. 412, 421 (1986). In determining if the waiver was the voluntary product of a  
3 rational and free will, the court must look at the totality of the circumstances. Id.; United States v.  
4 Orso, 266, F.3d 1030, 1039 (9<sup>th</sup> Cir. 2001). “A defendant’s mental state alone does not make a  
5 statement involuntary.” United States v. Turner, 926 F.2d 883, 888 (9<sup>th</sup> Cir. 1991) *citing* Connelly,  
6 479 U.S. at 169-171.

7 When considering if a defendant has been coerced into waving his rights, the court may  
8 consider physical or psychological coercion or the use of improper inducement in effort to overbear  
9 the suspect’s will. United States v. Coleman, 208 F.3d 786, 791 (9<sup>th</sup> Cir. 2000). The inducement  
10 to cooperate with the government by suggesting that the cooperation will have a positive effect on  
11 potential future sentencing of the defendant is not improper coercion. Williams v. Woodford, 384  
12 F.3d 567, 595 (9<sup>th</sup> Cir. 2004); Coleman 208 F.3d at 791 (assurance by agents that they will tell the  
13 prosecutor to give “little or not time” to defendant is not improper coercion). The use of promises  
14 of leniency in conjunction with threats or other forms of coercion, however, does qualify as  
15 improper coercion and any waiver made under these circumstances is invalid. Williams at 595.

16 In the case at hand, the defendant argues that his waiver of Miranda rights was involuntarily  
17 made as, 1) it was the result of coercion by the officers, and 2) at the time of the waiver he was  
18 under the influence of narcotics which made him incapable of comprehending the rights he was  
19 waiving and the consequence thereof. An analysis of both arguments in light of a review of the  
20 video-taped interrogation of the defendant reveals that Drew was not coerced and appeared  
21 physically and mentally capable of understanding the nature of his rights and the consequence of  
22 waiver. See Government’s Opposition #36, Exhibits D (“Tape 1”) & E (“Tape 2”), videotaped  
23 interview of defendant.

24 **A. Coercion**

25 The defendant argues that he was coerced into waiving his rights and making a statement of  
26 confession out of concern for the safety of his wife and children. Drew states that several statements  
27 were made in attempts to coerce his cooperation, including being told that if he cooperated he would  
28 not be charged as a habitual criminal and that his cooperation could be the difference in a 20 year

1 sentence or life. Tape 2 at 6:30 and 8:00. Drew further points to a reference made by Sgt. Cowley  
2 that the sergeant had visited the district attorney and was told Drew was looking at a habitual charge,  
3 and that he should come clean so as to avoid the charge. Tape 2 at 22:20. Drew argues that his  
4 waiver should be found involuntary, as in the case of United States v. Tingle, 358 F.2d 1332 (9th Cir.  
5 1981). In Tingle, defendant's waiver was found to be involuntary due to the agent's acts of coercion,  
6 specifically stating the maximum sentences possible for the alleged crime, that she would never see  
7 her two-year old daughter again, and that the prosecutor would be informed that she was stubborn  
8 and uncooperative.

9 A review of defendant Drew's taped interview reveals that while statements by the sergeants  
10 were made to induce cooperation and confession, there were no threats made in conjunction with  
11 promises of leniency that would invalidate Drew's statement. Williams at 595. In fact, the  
12 statements were made in light of Drew's comments that in his prior conviction he never received any  
13 benefit from cooperating with police, specifically that his cooperation did not lead to a reduced  
14 sentence. Though the sergeants did make statements about possibly recommending a lighter  
15 sentence to the district attorney, they were clear in their position that no promises could be provided  
16 to Drew as to his ultimate sentence in exchange for his cooperation. Only after it became apparent  
17 that his offer to cooperate by leading the police to other individuals of interest would not result in  
18 a deal for a reduction in charges or sentence, did Drew confess. And unlike in Tingle, no comments  
19 were made that the prosecutor would be informed that he was uncooperative nor was he threatened  
20 with never seeing his children again as a result of his failure to cooperate. Rather, conversation  
21 regarding Drew's family expressed more concern to return him to his family by means of the shortest  
22 sentence than keeping him from them as a form of punishment. Therefore, the court finds the  
23 defendant was not coerced into a waiver of his Miranda rights.

#### 24 **B. Drug Use**

25 The defendant also claims there is evidence that he was under the influence of narcotics at  
26 the time of his interrogation, and therefore the officers should have known that he could not  
27 voluntarily waive his rights. As evidence of his impairment, Drew points to comments he made  
28 during the interview that his nerves were shot, he needed a drink of water, that he hadn't slept in days

1 and that he needed help (referencing his drug problem). Tape 1 at 15:50; Tape 2 at 11:00, 15:10.  
2 Drew also argues that statements by Sgt. Lee that “meth will make you do crazy stuff” and that meth  
3 will “ make you do bad things” is evidence acknowledging Drew’s condition. Tape 2 at 30:40 and  
4 42:10. In further support of this argument, the defendant points to the fact that the small black case  
5 he discarded while attempting to run from the police was found to contain methamphetamine.

6 In United States v. Rodriguez-Rodriguez, 364 F.3d 1142, 1146 (9<sup>th</sup> Cir. 2004) the court held  
7 after a review of the evidence that a defendant suffering withdrawal from heroin was able to  
8 voluntarily and intelligently waive his Miranda rights. As in Rodriguez, a review of the evidence  
9 in this case shows that Drew was capable of voluntary waiver and was not in fact impaired so as to  
10 prevent his knowing and intelligent consent to questioning. When viewed in context, the statements  
11 Drew cites as evidence of physical impairment appear to be normal signs of nervousness exhibited  
12 upon detention and questioning by the police. When referencing “shot nerves” the defendant and  
13 sergeants are discussing his ability to remember details about the burglaries and his activities over  
14 the previous days. When stating that he hadn’t slept in days, the reference was made to his sleep  
15 deprivation prior to being taken into custody and appeared to be a reference to excuse his  
16 nervousness. When stating that his mouth was dry and he needed a drink of water, Drew was given  
17 water after which he did not mention further physical concerns. Any physical fidgeting displayed  
18 by the defendant appears in anticipation of questioning or when presented with specific evidence of  
19 his involvement in the burglary.

20 The acknowledgment of Drew’s methamphetamine use by the officer was done in the  
21 context of burglary as a means of supporting drug use or burglary committed while under the  
22 influence. This acknowledgment does not demonstrate that the defendant was under the influence  
23 of drugs during his interrogation. The fact that Drew was in possession of methamphetamine prior  
24 to his arrest also does not imply that he was under the influence of narcotics, or withdrawal from  
25 narcotics. All of these factors, in conjunction with the fact that the defendant was questioned a day  
26 after being arrested and was facing possible charges as a habitual criminal, indicate that the  
27 defendant was not impaired and that his waiver was voluntary. Therefore, his statements should not  
28 be suppressed..

**RECOMMENDATION**

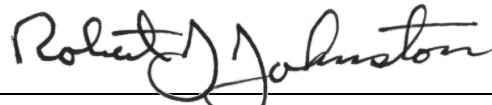
Based on the foregoing and good cause appearing therefore,

IT IS THE RECOMMENDATION of the undersigned Magistrate Judge that the Defendant's Motions to Suppress (#35) be **DENIED**.

**NOTICE**

Pursuant to Local Rule IB 3-2 any objection to this Report and Recommendation must be in writing and filed with the Clerk of the Court within ten (10) days. The Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to the failure to file objections within the specified time. Thomas v. Arn, 474 U.S. 140, 142 (1985). This circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly address and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of the District Court. Martinez v. Ylst, 951 F.2d 1153, 1157 (9th Cir. 1991); Britt v. Simi Valley United Sch. Dist., 708 F.2d 452, 454 (9th Cir. 1983).

DATED this 25<sup>th</sup> day of May, 2006.



ROBERT J. JOHNSTON  
United States Magistrate Judge